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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

GTE System Telephone Companies)

GSTC Tariff FCC No. 1)

GSTC Trans. No. 260)

CC Docket No. 98-167

To: Competitive Pricing Division

**OPPOSITION TO DIRECT CASES
OF FOCAL COMMUNICATIONS, INC.**

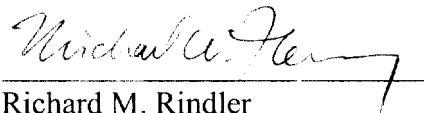
Focal Communications, Inc. ("Focal"), by its undersigned counsel, pursuant to the Order Suspending Tariff and Designating Issues for Investigation in this proceeding, submits these comments on the direct case filed by GTE System Telephone Companies ("GSTC"). Focal opposes the tariff of GSTC because the services provided thereunder are not exchange access and, accordingly, the tariff is not a legitimate "exchange access" tariff. Moreover, to the extent that the proposed DSL services are similar to local dial-up telecommunications services, the telecommunications service from the end user to the ISP terminates at the ISP, at which point information services begin. The telecommunications service that would be subject to tariffing would be solely intrastate if it was provided to connect an end user to an information service provider. Finally, 21 state commissions have determined that dial-up traffic from an end user to an ISP is local for the purposes of reciprocal compensation under the terms of interconnection agreements. Any ruling by this Commission that in any way contradicted those decisions would raise federal-state conflicts and implicate federal preemption issues that are simply not relevant to the issue before the Commission here.

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Focal filed comments in the proceedings considering the ADSL tariffs of GTE Telephone Operating Companies, BellSouth Telecommunications, Inc., and Pacific Bell Telephone Company.¹ Because the tariff under investigation in this proceeding "is identical to the ADSL offering previously filed in the GTOC Tariff FCC No. 1,"² Focal provides a copy of its Comments on the Direct Cases filed on September 18, 1998, and incorporates those comments into this investigation by reference.

Respectfully submitted,



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Dated: October 5, 1998

Counsel for Focal Communications, Inc.

¹GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148 CC Docket No. 98-79; BellSouth Telecommunications, Inc., Tariff FCC No. 1 Access Service, BellSouth Trans. No. 476, CC Docket No. 98-161; Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Trans. No. 1986, CC Docket No. 98-103.

²Direct Case of GTE at 2.

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To: Competitive Pricing Division)	

**OPPOSITION TO DIRECT CASES
OF FOCAL COMMUNICATIONS, INC.**

Focal Communications, Inc. ("Focal"), by its undersigned counsel, hereby submits its Opposition to the Direct Cases of GTE Telephone Operating Companies ("GTE"), BellSouth Telecommunications, Inc. ("BellSouth"), and Pacific Bell Telephone Company ("Pacific Bell") (collectively, the "Proponents"), which were filed in the above-referenced dockets. Focal filed a Petition to Reject the GTE tariff¹ and opposes the tariffs of the Proponents because the services provided thereunder are not exchange access and, accordingly, the tariffs are not legitimate "exchange access" tariffs. Moreover, to the extent that the proposed DSL services are similar to local dial-up telecommunications services, the telecommunications service from the end user to the

¹GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148, *Petition to Reject, or to Suspend and Investigate, of Focal Communications, Inc. and ICG Communications, Inc.* (May 22, 1998).

ISP terminates at the ISP, at which point information services begin. The telecommunications service that would be subject to tariffing would be solely intrastate if it was provided to connect an end user to an information service provider. Finally, 21 state commissions have determined that dial-up traffic from an end user to an ISP is local for the purposes of reciprocal compensation under the terms of interconnection agreements. Any ruling by this Commission that in any way contradicted those decisions would raise federal-state conflicts and implicate federal preemption issues that are simply not relevant to the issue before the Commission here.

I. ADSL Service to ISPs is not Exchange Access by Definition

The Commission should reject the ADSL tariffs of Pacific Bell, BellSouth and GTE as defective because the services provided thereunder are not exchange access and, accordingly, the tariffs are not legitimate "exchange access" tariffs. Exchange access is defined by the Communications Act as "the offering of access to telephone exchange services or facilities for the purposes of the origination and termination of telephone toll services." 47 U.S.C. § 153(16). Telephone toll service is defined by the Act as "telephone service between stations in different exchange areas for which there is made a separate charge not included in the contracts with subscribers for exchange service." 47 U.S.C. § 153(48). Although the term "telephone service" is not defined, "telephone exchange service" is defined in the Act. Telephone exchange service is defined, in pertinent part, as "a . . . service provided . . . by which a subscriber can originate and terminate a telecommunications service" within a local exchange. 47 U.S.C. § 153(47). "Telephone service" would reasonably be identical to "telephone exchange service," but not restricted to the local exchange, or simply a service by which a subscriber can originate and terminate any telecommunications service.

Accordingly, in order for the ADSL service provided by the Proponents to be exchange access under the Act, the service provided by the subscriber of exchange access services must be telecommunications service. The services and facilities that the Proponents propose to provide will be purchased primarily by ISPs and will be used to connect local exchange end users to ISPs. The service provided by ISPs, however, is not telephone toll service because it is not telecommunications. As the Commission has recently reported to Congress, ISPs "generally do not provide telecommunications."² Instead, ISPs provide information services, of which telecommunications is a component.³ Information services and telecommunications services are mutually exclusive.⁴ Because ISPs do not provide telecommunications, they cannot provide telephone toll service, and the service offerings of the Proponents to ISPs cannot be exchange access as defined by the Act.

The Proponents fare no better under the Commission's definition of "access service." First, the Commission's definition of exchange access or access service can not expand the terms of the statute that such definition is intended to implement. Second, in the Commission's definition, "'Access Service' includes services and facilities provided for the origination and termination of any interstate or foreign telecommunications." 47 C.F.R. § 69.2(b). Again, the person to whom "access service" is provided must be a telecommunications provider in order to originate or terminate telecommunications to or from an interstate or foreign location. Because ISPs are not

²In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, FCC 98-67 paras. 15, 55 (rel. Apr. 10, 1998).

³*Id.* para. 81.

⁴*Id.* paras. 13, 39.

telecommunications providers, the service they obtain from local exchange carriers cannot be "access service." Under either the Act or the rules of the Commission, the ADSL services proposed by Pacific Bell, BellSouth and GTE are not exchange access.

This is not to say, however, that no ADSL service will fall within the definition of "exchange access" traffic as set forth in the Communications Act of 1934. There may be instances when ADSL could be used to provide end-to-end telecommunications services, for example, when an interexchange carrier subscribes to ADSL to connect its packet network through a local carrier's packet network to reach a customer. With regard to the tariffs in this particular investigation, however, because ISPs provide information services, the Commission must conclude that the ADSL tariffs are not exchange access tariffs and therefore reject them as being defective without answering any of the jurisdictional questions raised in this investigation.

II. To the Extent DSL Services Mirror Local Dial-up Services, DSL Services from an End User to an ISP are Intrastate

It is not at all clear that DSL services are in all respects akin to local dial-up services. While DSL services use the same local loop as local dial-up services, DSL services generate no dial tone, and they completely bypass the circuit-switched network. While dial-up services may be measured in terms of minutes of use, it is clear that the use of DSL services are not measured the same way. Nevertheless, both DSL services and dial-up services are telecommunications, and to the extent that they are alike, DSL services from an end user to an ISP terminate at the ISP. Because these telecommunications services terminate at the ISP within the local exchange, they are intrastate services subject to state regulation.

The telecommunications from the end user to the ISP terminates at the ISP because the ISP

is an end user of telecommunications and a provider of information services. The intrastate call that is delivered to the ISP and any subsequent service that is provided by the ISP are separate and distinguishable services. The *information service* provided by the ISP is wholly separate from the local exchange *telecommunications service* provided by the local exchange carrier.

Further evidence of the local character of the first component of the Internet service is the Commission's treatment of ISPs under the Act. The Commission does not treat ISPs as interexchange carriers, in as much as it does not require ISPs to contribute to the Universal Service Fund, a fund to which *all* interstate carriers must contribute.

In fact, all major means of accessing the Internet currently in use, namely business lines, ISDN and dedicated lines, are tarified at the state level. Most, if not all, RBOCs charge their own customers local rates for traffic to ISPs and therefore classify such traffic as local for purposes of interstate separations. This is a clear demonstration that the LECs treat the call from its customer to the ISP as a local call.

III. The Commission Should Refrain from Creating Any Conflicts with Valid State Commission Decisions

It should be apparent to the Commission that the reason GTE and the BOCs have filed their tariffs at the FCC on the grounds that their ADSL service is exchange access is to present the Commission with an opportunity to create a conflict with state commission decisions that have ruled that local exchange dial-up traffic from an end user to an ISP is local and eligible for reciprocal compensation under valid interconnection agreements. DSL services have significant similarities with ISDN services, yet none of the ILECs in this proceeding have tarified ISDN services at the federal level as exchange access. Moreover, GTE has asserted that its ADSL service is exclusively

interstate, contrary to every BOC that has already filed state tariffs for ADSL as an intrastate service. GTE and the BOCs are hoping that, by allowing their federal ADSL tariffs to go into effect and asserting jurisdiction over DSL services provided in the local exchange, the Commission will rule that all traffic from an end user to an ISP is jurisdictionally interstate. The Commission should reject the ILEC gambit for a number of reasons, not the least of which will be the effect such a declaration will have on federal-state relations.

As the Commission is aware, when GTE and the BOCs unilaterally withheld payment of reciprocal compensation for the transport and termination of local exchange traffic from one end user to another end user that happens to be an ISP, which was otherwise due pursuant to valid interconnection agreements that had been approved by state commissions, CLECs were compelled to file complaints with the applicable state commissions. For the past 16 months, CLECs have been squaring off against ILECs for this compensation across the country. To date, 21 state commissions have ruled on the issue, and all 21 have found in favor of CLECs.⁵ Every state commission to have considered the issue has found that calls from end users to ISPs are local traffic subject to reciprocal compensation.

On this issue, GTE has said that the Commission need not resolve the reciprocal compensation issue now.⁶ At the same time, GTE states, "Of course, the Commission's

⁵A list of the 21 state decisions is attached as Exhibit 1.

⁶Direct Case of GTE at 7. Bell South claims that state decisions cited by the opponents of its DSL tariff regarding reciprocal compensation for switched calls to ISPs are not relevant to the jurisdictional classification of Bell South's DSL service offering. Bell South Reply at 9; *accord* GTE Reply at 10; Pacific Bell Reply at 9.

jurisdictional analysis here may provide guidance in *future* cases addressing related issues."⁷ Whether the "future" cases are the inevitable battles in the remaining 29 states, or the appeals of the 21 decisions, is not clear. Regardless, Bell South has requested that at least one appeal of the state decisions be suspended until the Commission rules in this proceeding.⁸ It is clear that BellSouth, GTE, and presumably all other BOCs are hoping for some ruling in this proceeding that can be used against CLECs and state commissions in the struggle over reciprocal compensation for ISP-bound traffic.

Focal recognizes that the Commission has told the North Carolina court that (1) it does not seek the referral of questions relating to interconnection agreements, including whether calls to ISPs are local within the meaning of the reciprocal compensation provisions of the agreements, (2) that any decision in this proceeding may not have an effect on the reciprocal compensation issue, and (3) that the proper construction of agreements previously entered into would not necessarily turn on a subsequent determination by the FCC of the jurisdictional issue.⁹ Nevertheless, the Commission should be acutely aware of the possible consequences of a ruling that could be argued by GTE and the BOCs as an endorsement of their position regarding reciprocal compensation for dial-up traffic

⁷GTE Direct Case at n.16 (emphasis added).

⁸Motion for Primary Jurisdiction Referral, *BellSouth Telecomms. v. US LEC of North Carolina*, No. 3:98CV170-MU (W.D.N.C. Aug. 4, 1998). Although not a party to this proceeding, Ameritech has filed similar motions seeking to defer resolution of its own appeals until the Commission has ruled in this case. Motion for Primary Jurisdiction Referral or, in the Alternative, for Reconsideration, *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, Case No. 98 C 1295 (N.D.Ill. Aug. 14, 1998). Ameritech's Motion in Illinois was denied.

⁹Response of Federal Communications Commission as Amicus Curiae, *BellSouth Telecomms v. US LEC of North Carolina*, No. 3:98CV170-MU (W.D.N.C. Aug. 27, 1998) ("*FCC Amicus Curiae Brief*") [attached hereto as Exhibit 2].

from an end user to an ISP. As a threshold matter, it is important to recognize, and for the Commission to state, that any ruling here that could be interpreted to spill over to effect dial-up traffic will not reverse the decisions of state commissions interpreting interconnection agreements between CLECs and ILECs. The Commission should understand that any such decision will no doubt be used by the BOCs and GTE in an effort to complicate enforcement of those decisions, to which ILECs have been loathe to comply.

Although federal preemption of state telecommunications regulation may be available in some narrow circumstances, it is not appropriate here. The FCC may preempt the states "only when (1) it is impossible to separate the interstate and intrastate components of the FCC regulation and (2) the state regulation would negate the FCC's lawful authority over interstate communications."¹⁰ At issue in the decisions to date is state regulation of dial-up traffic in connection with the enforcement of interconnection agreements. The Commission has recognized that states have exclusive jurisdiction over the enforcement of interconnection agreements.¹¹ If the Commission were to preempt the states on this issue, its preemption authority would not apply to the interpretation or enforcement of interconnection agreements.¹²

Even if federal preemption were somehow appropriate – and it is not – the Commission's

¹⁰*Iowa Utils. Bd.*, 120 F.3d at 796.

¹¹*FCC Amicus Curiae Brief* at 2, 6.

¹²A number of the state decisions have been decided solely on the language of the interconnection agreements without reliance on FCC interpretation of applicable law whatsoever. See *In re WorldCom, et. al v. BellSouth Telecomms., Inc.*, Docket No. 971478-TP, *Final Order Resolving Complaints*, PSC-98-1216-FOF-TP (Sep. 15, 1998)[attached hereto as Exhibit 3]; *Illinois Bell Tel. Co. v. WorldCom Techs., Inc., etc., et al.*, No. 98 C 1925 (Jul. 21, 1998) [attached hereto as Exhibit 4].

exercise of preemption authority would no doubt be challenged by many, if not all, of the states whose jurisdiction was preempted. The traffic in question in the reciprocal compensation cases -- dial-up traffic from one local exchange service number to another local exchange service number -- is *prima facie* local traffic. The fence between federal and state jurisdiction created by Section 2(b) of the Communications Act, already difficult to hurdle pursuant to *Iowa Utilities Board v. FCC*, is all the more difficult to clear when the traffic in question looks local, is provided on a local basis, is considered local for separations purposes, and is billed as local by the ILECs that want to call it interstate. Although the Proponents may be seeking a single, uniform ruling from the FCC, a declaration that local dial-up traffic to ISPs is not local will in fact result in additional costly, time-consuming litigation.

Finally, twenty-one states have already deemed dial-up traffic from an end user to an ISP to be local for the purposes of reciprocal compensation. The traffic in question in this proceeding, DSL traffic, is not dial-up traffic. There is no reason for the Commission to create a conflict over dial-up telephone traffic when the issue here can be resolved without deciding the reciprocal compensation issue that to date has been solely decided by the states. In order to avoid even the trace of a conflict with the state decisions, if the Commission determines that DSL traffic has interstate applications that fall within its jurisdiction, it should also recognize that there are significant differences between DSL traffic and dial-up traffic to ISPs so as to dispose of any challenges to the jurisdiction of dial-up traffic.

IV. Conclusion

The services provided under the tariffs of the Proponents are not exchange access and, accordingly, the tariffs are not legitimate "exchange access" tariffs. For the reasons stated above,

the Commission should reject the interstate ADSL tariffs under investigation in each of the above-referenced dockets. In the event that the Commission does not reject the ADSL tariffs, any ruling approving the tariffs must be narrowly tailored to apply solely to DSL traffic so as to avoid any conflict with state commission decisions addressing dial-up traffic to ISPs and avoid unnecessary consideration of the Commission's preemption authority under these circumstances.

Respectfully submitted,



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Dated: September 18, 1998

Counsel for Focal Communications, Inc.

EXHIBIT 1

LIST OF STATES FINDING CALLS TO ISPS TO BE LOCAL

STATE COMMISSION DECISIONS REGARDING RECIPROCAL COMPENSATION FOR LOCAL TRAFFIC TO INTERNET SERVICE PROVIDERS

1. **ARIZONA:** *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996*, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 *et al.* (Az. C.C. Oct. 29, 1996) at 7. US West has appealed the decision on other issues to the United States District Court for the District of Arizona, Docket Nos. U-3021-96-448 (consol.).
2. **COLORADO:** *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Decision Regarding Petition for Arbitration*, Docket No. 96A-287T (Co. PUC Nov. 5, 1996) at 30. The Colorado Public Utilities Commission has since affirmed its rejection of US West's efforts to exclude ISP traffic from reciprocal compensation by rejecting such a provision in a proposed US West tariff. *The Investigation and Suspension of Tariff Sheets Filed by US West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection. Local Termination, Unbundling and Resale of Services*, Docket No. 96A-331T, Commission Order, at 8 (Co. PUC July 16, 1997). US West has appealed the arbitration decision to the United States District Court for the District of Colorado, Civil Action Nos. 97-D-152 (consol.).
3. **WASHINGTON:** *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252*, Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26; The U.S. District Court for the Western District of Washington upheld the WUTC decision. In its decision, the District Court stated that the WUTC decision not to change the current treatment of ESP calls as eligible for reciprocal compensation is "properly based on FCC regulations which exempt ESP providers from paying access charges." *U S West Communications, Inc. v MFS Intelenet, Inc. et al.*, Order, No. C97-222WD (W.D. Wash. January 7, 1998) at 8 (Citing 47 C.F.R. Part 69). US West has appealed the district court decision to the United States Court of Appeals for the Ninth Circuit, Case No. CV-97-00222-WLD.
4. **MINNESOTA:** *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCI metro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) at 75-76. US West has appealed the arbitration decision to the United States District Court for the District of Minnesota, Civil Action No. 97-913 MJD/AJB.

5. **OREGON:** *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996) at 13. US West has appealed the arbitration decision to the United States District Court for the District of Oregon, Civil Action No. CV97-857-JE.
6. **NEW YORK:** When WorldCom filed a complaint with the New York Public Service Commission ("NYPSC") after New York Telephone (now owned by Bell Atlantic) began to unilaterally withhold payment of reciprocal compensation for local exchange traffic delivered to ISPs served by WorldCom, the NYPSC ordered New York Telephone to continue to pay reciprocal compensation for such traffic. *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, Order Denying Petition and Instituting Proceeding (N.Y. PSC. July 17, 1997). The Order also instituted a proceeding to consider issues related to Internet access traffic. On December 17, 1997, the New York Commission approved a Recommendation in that proceeding. Public Session of the Public Service Commission, December 17, 1997 (N.Y. PSC) at 14-15. *See also*, Order Closing Proceeding, (NYPSC March 19, 1998).
7. **MARYLAND:** The Maryland Public Service Commission ruled on September 11, 1997 that local exchange traffic to ISPs is eligible for reciprocal compensation. Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, Inc. On October 1, 1997, the Commission rejected Bell Atlantic's petition for reconsideration. Bell Atlantic appealed the decision to the Circuit Court for Montgomery County (CA No. 178260); the Circuit Court upheld the Commission decision. A written decision is not available.
8. **CONNECTICUT:** The Connecticut Department of Public Utility Control has also concluded that these calls are subject to reciprocal compensation. *Petition of the Southern New England Telephone Company For a Declaratory Ruling Concerning Internet Service Provider Traffic*, Docket No. 97-05-22 (Conn DPUC Oct. 10, 1997) at 11.
9. **VIRGINIA:** The Virginia State Corporation Commission reached the same conclusion. *Petition of Cox Virginia Telcom, Inc. for Enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. S.C.C. Oct. 24, 1997) at 2; Notice of Appeal Withdrawn.
10. **TEXAS:** On February 5, 1998, the Texas Public Utility Commission reversed an arbitrator's ruling and found that calls made by Southwestern Bell Telephone's end users that terminated to ISPs on competitors' networks are local calls entitled to reciprocal compensation under interconnection agreements. *Complaint and Request for Expedited Ruling of Time Warner Communications*, Order, PUC Docket 18082 (TX PUC, February 27, 1998). As the Commission's Chairman concluded, "... I do feel comfortable that (a) we have jurisdiction; that (b) these are local calls that should be compensated accordingly; and that (c) I don't really see any ability or desire on my part to undo a business contract." *Id.* at 23. The

United States District Court for the Western District of Texas affirmed the Commission decision. *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, Case No. MO-98-CA-43, June 22, 1998.

11. **WEST VIRGINIA:** The West Virginia Commission also concluded that "calls that originate and are terminated to ISPs in local calling areas are treated as local traffic -- regardless of whether the ISP reformats or retransmits information received over such calls to or from further interstate (or international) destinations." *Petition For Arbitration of Unresolved Issues For the Interconnection Negotiations Between MCI and Bell Atlantic - West Virginia, Inc.*, Order, Case No. 97-1210-T-PC (W.Va. PSC Jan. 13, 1998) at 29.
12. **MICHIGAN:** On January 28, 1998, the Michigan Public Service Commission concluded that Ameritech's withholding of reciprocal compensation in Michigan violated its interconnection agreements. *Consolidated Petitions of Brooks Fiber Communications of Michigan, Inc., TCG Detroit, MFS Intelenet of Michigan, Inc, and Brooks Fiber Communications of Michigan, Inc. against Michigan Bell Telephone Company, d/b/a Ameritech Michigan and Request for Immediate Relief*, Order, Case Nos. U-11178, U-11502, U-11522, U-11553 (Mich. PSC Jan. 28, 1998) at 1. The Commission held that FCC precedent, the interconnection agreements "on their face," and Ameritech's conduct and implementation of the interconnection agreements "fully support a conclusion that those agreements require reciprocal compensation for calls to ISPs." *Id.* at 8, 11, 14-15. Ameritech has appealed the Commission decision to the United States District Court for the Western District of Michigan, Case No. 5:98-CV-18.
13. **NORTH CAROLINA:** *In the Matter of Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, LLC*, Order Concerning Reciprocal Compensation for ISP Traffic, Docket No. P-55, Sub 1027 (N.C. Util. Comm. Feb. 26, 1998) at 6. BellSouth has appealed the Commission decision to the United States District Court for the Western District of North Carolina, Civil Action No. 3:98CV170H.
14. **ILLINOIS:** *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois, et al.*, Docket Nos. 97-0404, 97-0519, 97-0525 (Consol.), Order, (Ill. C.C. Mar. 11, 1998) at 15. The United States District Court for the Northern District of Illinois affirmed the Commission's decision. *Illinois Bell Telephone v. WorldCom Technologies, Inc.*, Case No. 98-C-1925, Memorandum Opinion and Order, July 21, 1998.
15. **MISSOURI:** The Missouri Public Service Commission found that calls to ISPs should be treated and compensated as if they are local calls by the parties pending the FCC's final determination of the issue. *In the Matter of the Petition of Birch Telecom of Missouri, Inc. For Arbitration of the Rates, Terms, Conditions, and Related Arrangements for Interconnection with Southwestern Bell Telephone Company*, Arbitration Order, Case No. TO-98-278 (Mo. P.S.C. Apr. 23, 1998) at 8.
16. **WISCONSIN:** The Wisconsin Public Service Commission found that calls to an Internet service provider are local traffic - not switched exchange access service - under an applicable

interconnection agreement. *Re: Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG-Milwaukee, Inc.* Letter from Lynda L. Dorr, Secretary to the Commission, Public Service Commission of Wisconsin, to Rhonda Johnson and Mike Paulson, dated May 13, 1998. Ameritech has appealed the decision to the United States District Court for the Western District of Wisconsin, Civil Action No. 98 C 0366 C.

17. **OKLAHOMA:** *In the Matter of Brooks Fiber Communications of Oklahoma, Inc. et al. For An Order Concerning Traffic Terminating To Internet Service Providers and Enforcing Provisions of the Interconnection Agreement With Southwestern Bell Telephone Company*, Case No. PUD 970000548, Order No. 423626 (June 3, 1998).
18. **PENNSYLVANIA:** *Petition for Declaratory Order of TCG Delaware Valley, Inc.*, Docket No. P-00971256, (June 16, 1998).
19. **TENNESSEE:** *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-00118, voted to Affirm Hearing Officer, June 2, 1998.
20. **FLORIDA:** *Complaint of World[Com] Technologies, Inc. Against BellSouth Telecommunications, Inc., for Breach of Terms of Florida Partial Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief*, Docket No. 971478-TP, Final Order Resolving Complaints, Order No. PSC-98-1216-FOF-TP (Fla. PSC Sep. 15, 1998).
21. **OHIO:** *Complaint of ICG Telecom Group, Inc. v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation*, Case No. 97-1557-TP-CSS, Opinion and Order (PUCO, Aug. 27, 1998).

EXHIBIT 2

AMICUS BRIEF OF F.C.C.

BellSouth Telecommunications v. US LEC of North Carolina
No. 3:98CV170-MU (W.D.N.C. Aug. 27, 1998)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

BellSouth Telecommunications, Inc.
Plaintiff,

v.

US LEC of North Carolina, L.L.C., and The
North Carolina Utilities Commission,
Defendants.

Civil Action No. 3:98CV170-MU

**RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION
AS AMICUS CURIAE TO MOTION FOR REFERRAL OF ISSUE**

The Federal Communications Commission respectfully submits this response as amicus curiae to the "Memorandum of Plaintiff BellSouth Telecommunications, Inc. in Support of Primary Jurisdiction Referral," filed with the Court on August 4, 1998. In its Memorandum, BellSouth asks this Court to refer to the FCC, under the doctrine of primary jurisdiction, two issues in this case: the proper jurisdictional treatment of calls made to the Internet through Internet service providers (ISPs), and whether such calls are subject to the reciprocal compensation requirements of section 251(b)(5) of the Communications Act of 1934 ("Act"), as amended by the Telecommunications Act of 1996, 47 U.S.C. § 251(b)(5). Without taking a position on BellSouth's request for referral of the jurisdictional issue, the FCC notes that the question whether calls to ISPs are subject to FCC jurisdiction already is before the FCC in ongoing proceedings and will be addressed by the agency promptly in those proceedings. In addition, the FCC does not seek referral of any issues relating to the enforcement of interconnection agreements negotiated or arbitrated pursuant to sections 251 and 252 of the Act, including whether calls to ISPs are "local" calls within the meaning of the reciprocal

compensation provisions in BellSouth's interconnection agreement with US LEC of North Carolina. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997) (holding that, except in limited circumstances, the FCC lacks jurisdiction to enforce the terms of interconnection agreements negotiated or arbitrated pursuant to sections 251 and 252), cert. granted, 118 S. Ct. 879 (1998).¹

A. BACKGROUND

Although the 1984 breakup of the Bell System helped spur the growth of competition in the long distance telephone market, the incumbent local exchange carriers ("LECs") retained monopoly control of local telephone markets. In almost every city or town in the United States, a single incumbent LEC, by virtue of its ownership of the local exchange network, controls local exchange service. Because that network also is the gateway to long distance service, the same incumbent LEC also has control over access by callers to that competitive market.

Congress addressed the competitive structure of telecommunications markets in the Telecommunications Act of 1996.² Congress sought to end the incumbent LECs' monopoly control over local and long distance access service markets, creating instead a "pro-competitive, de-regulatory national policy framework" with the goal of "opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d

¹ The Commission and other parties petitioned the Supreme Court for a writ of *certiorari* to review the *Iowa* decision, and the Supreme Court granted those petitions. 118 S. Ct. 879 (1998). Argument before the Supreme Court will be held on October 13, 1998.

² P.L. 104-104, 110 Stat. 56, enacted February 8, 1996. The 1996 Act amends the Communications Act of 1934, which is codified at 47 U.S.C. § 151, et seq.

Sess. 1 (1996). As part of this framework, Congress required incumbent LECs to permit their competitors (competitive LECs, or "CLECs") to interconnect with the local network, to have the use of "unbundled" elements of the network, and to buy local service at wholesale rates for resale to end users. 47 U.S.C. § 251(c)(2)-(4). The CLECs were expected to compete with the ILECs for local as well as local exchange access business.

The 1996 Act also required all LECs (incumbents as well as CLECs) to establish "reciprocal compensation arrangements [with other LECs] for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The FCC has interpreted this provision to apply only to the transport and termination of "local telecommunications traffic."³ Although the United States Court of Appeals for the Eighth Circuit vacated in part the FCC's reciprocal compensation rules, see Iowa Utils. Bd. v. FCC, 120 F.3d 753, a number of state public utility commissions also have interpreted section 251(b)(5) to apply only to local telecommunications traffic. As required by the statute, carriers across the country (such as the parties to this

³ E.g., 47 C.F.R. § 51.701(e)(emphasis added).

[A] reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

See also 47 C.F.R. § 51.703(a). The FCC defined "local telecommunications traffic" for this purpose as "[t]elecommunications traffic between a LEC and a telecommunications carrier ... that originates and terminates within a local service area established by a state commission" 47 C.F.R. § 51.701(b). Although these rules were among those vacated by the Eighth Circuit, they were not disturbed to the extent that they apply to Commercial Mobile Radio Service providers. 120 F.3d at 819 n.39.

case) have included provisions in their interconnection agreements providing for reciprocal compensation for local telecommunications traffic. See, e.g., BellSouth Memorandum at 2 (quoting BellSouth-US LEC Interconnection Agreement § IV.B)("[e]ach party will pay the other for terminating its local traffic on the other's network") (emphasis added).

This case arises out of a dispute between BellSouth and US LEC over the application of the reciprocal compensation provision in their agreement in North Carolina. That agreement requires each party to pay "reciprocal compensation" to the other "for terminating its local traffic on the other's network." Interconnection Agreement, § IV.B. BellSouth and US LEC disagree about whether calls made from a customer of one of the carriers to the Internet through an Internet Service Provider ("ISP") that is served by the other carrier are local calls subject to reciprocal compensation. The North Carolina Utilities Commission ("NCUC"), acting in an enforcement action brought by US LEC to obtain payment from BellSouth for these calls, ruled that calls to ISPs are local calls and that US LEC is entitled to reciprocal compensation for that traffic under the agreement. See Order Concerning Reciprocal Compensation for ISP Traffic, Docket P-55, Sub 1027, at 6-7 (N.C. Util. Comm'n, Feb. 26, 1998). BellSouth filed a petition for review of the NCUC ruling in this Court. It later filed a motion to stay the proceeding "to permit referral of the controlling legal issue" to the FCC under the doctrine of primary jurisdiction.

B. PENDING FCC PROCEEDINGS.

Although the FCC has not yet expressly addressed the question whether calls to the Internet through ISPs are "local" calls, questions regarding the proper jurisdictional treatment of calls to the Internet have been raised in a number of proceedings currently pending before

the FCC. On May 15, 1998, GTE filed an interstate access tariff with the FCC to establish a new digital subscriber line (DSL) service offering that provides a high speed access connection between an end user subscriber and an ISP.⁴ The Common Carrier Bureau has issued an order designating for investigation the threshold issue whether GTE's DSL service is properly tariffed at the federal level.⁵ The FCC will issue an order concluding this investigation no later than October 30, 1998.⁶ Also pending before the agency are requests filed by MFS Communications Company, Inc. ("MFS"), a CLEC, and the Association for Local Telecommunications Services ("ALTS"), a trade association that represents CLECs, that the FCC clarify whether the reciprocal compensation obligations of section 251(b)(5) of the Act apply to calls made to CLEC subscribers that are ISPs, in response to which the FCC must resolve the threshold question whether calls to ISPs are subject to FCC jurisdiction.⁷

⁴ In re GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148 (filed May 15, 1998, to become effective May 30, 1998).

⁵ In re GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Order Designating Issues for Investigation, DA 98-1667(released August 20, 1998).

⁶ See 47 U.S.C. § 204(a)(2)(A) (five-month statutory deadline for orders concluding tariff investigations).

⁷ See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); Pleading Cycle Established for Comments on Request by ALTS for Clarification, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 FCC Rcd 9715 (released July 2, 1997). Although ALTS recently filed a letter with the Common Carrier Bureau seeking to withdraw its request for clarification, the issue ALTS raised remains pending before the Commission pursuant to the MFS petition and the agency's authority on its own motion to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. See also 5 U.S.C. § 554(e).

C. APPROPRIATE ACTION IN THIS CASE.

Several proceedings now pending before the agency pose the question whether calls to the Internet through ISPs are subject to FCC jurisdiction. The Commission will address this issue in the context of GTE's DSL tariff no later than October 30, 1998. It is unclear whether, or the extent to which, the FCC's resolution of the jurisdictional issue in the GTE tariff proceeding will be relevant to the proper treatment of ISP traffic under the terms of the interconnection agreement between BellSouth and US LEC. The FCC notes that the jurisdictional issue before it in the tariff proceeding does not involve application of the reciprocal compensation provisions of section 251(b)(5) or interpretation of the terms of an interconnection agreement.⁸ Moreover, the proper construction of the specific compensation agreement previously entered into between the parties would not necessarily turn on a subsequent determination by the FCC with respect to its jurisdiction over ISP traffic.

Accordingly, the FCC takes no position on BellSouth's motion for a primary jurisdiction referral of the jurisdictional question and also does not seek referral of questions relating to the enforcement of particular provisions of BellSouth's interconnection agreement with US LEC, including whether calls to ISPs are "local" calls within the meaning of the reciprocal compensation provisions of that agreement. See Iowa Utils. Bd., 120 F.3d at 804.

Respectfully submitted,

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⁸ See Iowa Utils. Bd., 120 F.3d at 804 (FCC lacks jurisdiction, except in limited circumstances, to enforce interconnection agreements under section 251 and 252).

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